No. 871

IN THE

Supreme Court of the United States

October Term 1957

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Columbia

REPLY OF APPELLANTS TO MOTIONS TO AFFIRM

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Now come the appellants in the above-entitled cause, the Railway Labor Executives' Association, et al., pursuant to Rule 16(3) of the Revised Rules of this Court to reply to the motions of the appellees, the Interstate Commerce Commission and the Rock Island Motor Transit Company, et al., to affirm the judgment of the District Court.[1]

[1] The motions are also addressed to the appeal of American Trucking Associations, Inc., et al. in Case No. 961. The principal appellee, the United States of America, which was a required statutory defendant in the suit below, has not filed such a motion.

I.

THE COMMISSION'S ORDERS CONSTITUTE AN INVALID ATTEMPT TO REMOVE THE CONDITIONS IMPOSED ON MOTOR TRANSIT'S OPERATIONS PURSUANT TO THE STATUTORY REQUIREMENTS OF SECTION 213 AND SECTION 5(2)(b).

In point 1 of their Jurisdictional Statement the appellants contended that the Interstate Commerce Commission does not have power to remove entirely restrictions on the purchased operating authority of a wholly-owned subsidiary of a railroad imposed in acquisition proceedings in accordance with the statutory requirements of Sections 213 and 5(2)(b) of the Interstate Commerce Act (49 U.S.C. 313 and 5(2)(b)) without regard to such statutory provisions and without determining that the operations as thus unrestricted will enable the parent railroad to use the service by motor vehicle involved to public advantage in its own rail operations. (Jur. Statement, 3, 15-20.) Appellants further argued that the Commission's action in the present case constitutes such an invalid removal of statutory restrictions under the guise of a Section 207 certificate proceeding. (Jur. Statement, 12-20.)

The interventor-appellees, the Rock Island Motor Transit Co., et al., make no effort in their motion for affirmance to answer this contention. The Interstate Commerce Commission in its motion meets this basic issue only by a brief half-hearted answer in a footnote. (Motion of I.C.C., 18, footnote 1.) This failure of the two appellees to deal with appellants' contention, and the equal failure of the District Court in its opinion to deal with the issue, strongly suggests that there is no adequate answer and that the Commission's orders involve a clear effort to evade the statute.

In its footnote the Commission states that the argument of the appellants is merely another way of contending that regardless of the need for transportation, a rail subsidiary may never be authorized to perform motor carrier service which is not auxiliary to and supplemental of the rail service of its parent. This characterization of appellants' argument is obviously erroneous.

The Commission's footnote omits the all important fact that appellants' argument is addressed only to operations acquired subject to Commission approval under Section 213 and Section 5(2)(b) and is applicable whatever may be the interpretation of Section 207 in a bona fide new route case involving a rail subsidiary. Appellants' point is simply that the agency cannot today permit a rail subsidiary to acquire motor carrier routes subject to the limitations of Section 5(2)(b) and tomorrow turn around and remove those limitations without regard to such statutory requirements under the guise of a certificate proceeding. Pursuant to the decision of this Court in *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951), the Commission can vary from time to time the specific restrictions imposed upon purchased routes to accomplish the statutory objective, but must at all times ensure that the parent railroad will be using the motor service involved to public advantage in its own rail operations.[2]

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[2] The District Court pointed out in its opinion that it was agreed that the requirement that the motor service involved be used in the operation of the railroad applicant means that the service must be auxiliary or supplementary to the rail service. (Appellants' Jur. Statement, Appendix B, 11a). Also see *Texas & Pacific M. Transport Co.—Com. Car. App.*, 41 M.C.C. 721 (1943). As this Court observed in *United States* v. *Rock Island Motor Transit Com-*

The Commission does not contend in its motion, nor has it ever argued, that it has power to authorize the acquisition of motor carrier operations of a rail subsidiary without meeting the requirements of the proviso of Section 5(2)(b). It merely argues that it has the power under Section 207 to grant new or additional motor carrier operations to a rail subsidiary without regard to the limitations of that proviso. The issue before the Court then simply boils down to a question of whether the removal of all Section 5(2)(b) and Section 213 limitations previously imposed upon operations of a rail motor carrier subsidiary in acquisition proceedings, constitutes the grant of new or additional operations[3] merely because the application therefor is labelled an application for a certificate under Section 207 rather than a request to reopen the acquisition proceedings. Appellants contend that it clearly does not.

II.

THE NATIONAL TRANSPORTATION POLICY AND THE REQUIREMENTS OF SECTION 5(2)(b) ARE LIMITATIONS ON THE PUBLIC CONVENIENCE AND NECESSITY UNDER SECTION 207.

In point 2 of their Jurisdictional Statement, appellants contended that the National Transportation Policy and the proviso of Section 5(2)(b) are limitations upon the scope of the public convenience and

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pany, 340 U.S. 419, 442 (1951), the Commission has varied the specific conditions imposed to meet the requirements of the proviso of Section 5(2)(b). However, this leeway does not enable the agency to ignore or wipe out such requirements as it has done in this case where it does not purport to have met them.

[3] The motion of Rock Island Motor Transit Co. et al., p. 4, clearly shows that the operations involved were the same as those already acquired under Sections 213 and 5(2)(b) as does the motion of the Commission, p. 7.

necessity under Section 207 so that in any event the Commission erred in disregarding these limitations in acting on Motor Transit's application.[4] In its motion to affirm the judgment of the District Court, the Commission contends that it has discretion in applying such requirements under Section 207 and that this construction is supported by the language, history, and consistent construction of the statute. (I.C.C. Motion, 10-18.)

The Commission argues that its present construction of Section 207 is supported by the failure of Congress in 1938 to avail itself of the opportunity ~~in 1938~~ to write the proviso of Section 5(2)(b) into Section 207. This opportunity came, says the Commission, in the form of a proposed amendment to Section 207 by Senator Shipstead which was withdrawn to prevent controversy. (I.C.C. Motion, 13.) However, the Commission has failed to inform the Court that Senator Shipstead withdrew his proposed amendment only after statements by Commissioner Eastman that it was the duty of the Commission to apply the restrictive proviso in Section 207 cases and upon the expressed understanding of the Senator that the amendment was unnecessary. These facts are clearly shown by the record of the hearings before the 75th Congress on S. 3606 at pages 26-31, 141.[5] Commissioner Eastman

[4] In their motion to affirm the Rock Island Motor Transit Co. et al., erroneously state (pp. 8, 9) that appellants contend that the Commission is prohibited from issuing motor carrier authority to railroads or their subsidiaries. Appellants have never so contended. Since the intervenor-appellees' legal argument is based on this false premise (pp. 8-11), it is totally irrelevant.

[5] Hearings before a Subcommittee of the Committee on Interstate Commerce of the United States Senate, 75th Congress, on S. 3606.

first indicated that the proposed amendment was merely an expression of existing law: (pp. 27-31)[6]

> "Commissioner Eastman . . . We have indicated that it seems to us consistent with the policy now reflected in section 213(a), paragraph 1; that his amendment should be added to section 207(a).
>
> * * * * * *
>
> "As a matter of fact, I think it could be argued with a great deal of force that in interpreting and applying the provisions of section 207(a) as it now stands, the Commission should read the act as a whole and take cognizance of this policy which is now reflected in section 213(a)(1).
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> * * * * * *
>
> ". . . If I had to pass on the issue now, I should say that in administering the provisions of section 207, it would be the duty of the Commission to read the act as a whole and to apply the same policy with respect to the extension of operations of a railroad-controlled motor carrier as is provided by the proviso of section 213.
>
> "Senator Johnson of Colorado: Under the present law?
>
> "Commissioner Eastman: Under the present law."

On this basis Senator Shipstead then withdrew his proposal: (page 141)

> "Senator Shipstead: . . . In view of the statement made by Commissioner Eastman for the

[6] The letter of the Commission to the subcommittee stated that "in good logic" it could see no reason why the proof requirements as to a railroad subsidiary should be any different in a certificate proceeding than in an acquisition case. The letter further stated that possibly, reading the act as a whole, it should be so read as it then stood, but since the matter was open to argument, the agency did not object to the amendment. (pp. 31, 31)

Commission as to their view of this matter, and also his personal view, that he thinks the provision of this amendment is already in the law, and that . . .

"Senator Johnson of Colorado (interposing) . . . that is, you mean the Shipstead amendment?

"Senator Shipstead: Yes; that it is already in the law, and evidently he considers it unnecessary at the present time. So, in order to save the time of the sub-committee, and in order to facilitate advancing the Commission's recommendations for amendments to the Motor Carrier Act, I withdraw, for the present at least, the amendment I offered. I think we will stand on the Commission's point of view, and the personal view of Commissioner Eastman."

These statements of Commissioner Eastman and Senator Shipstead show the Commission's argument to be wholly without merit.

The Commission also argues that its present interpretation is consistent with its past administrative practice. (I.C.C. Motion, 12-16.) The short answer to such contention is that this Court has expressly found to the contrary. In *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951), the Court stated at page 428:

"Although Section 207, providing for the issuance of certificates of convenience and necessity, has no clause requiring special justification for railroads to receive motor-carrier operating rights, such as appears in the proviso in former Section 213, present Section 5, the Commission applies the rules of the National Transportation Policy so as to read the proviso into Section 207 in order to preserve the inherent advantages of motor-carrier service."

Likewise, the Court in *United States* v. *Texas and Pacific Motor Transport Company,* 340 U.S. 450 (1951), stated as follows: (pp. 458 and 459)

> "This proceeding involves certificates for new routes under Section 207. No such certificates or applications were in that case [i.e., the Rock Island case]. The opinion, however, considered the Commission's practice in Section 207 proceedings and stated that it was the same as in Sections 5 and 213 acquisition proceedings."

These conclusions of the Court leave no room for argument as to what the Commission's past construction of the statute has been.

Finally, the Commission argues that the inclusion in Section 207 of a specific limitation that action thereunder is subject to Section 210 and the omission therefrom of any reference to Section 5(2)(b) presumably means that Congress did not intend that the restrictions of the latter be imported into Section 207. (I.C.C. Motion, 11, 12.) In so arguing the Commission ignores the specific language of the National Transportation Policy that all provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out such policy, which, as this Court found in the first *Rock Island* case, the Commission understood required that motor operations of railroads and their affiliates be auxiliary to and supplemental of train service.[7] The Commission has also apparently forgot its argument to the Court in that case and the companion case of *United States* v. *Texas & Pacific Motor Transport Co.,* 340 U.S. 450, found at page 53 of its brief in the latter proceeding:

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[7] *United States* v. *Rock Island Motor Transit Company,* 340 U.S. 419, 422.

"To be sure, section 207 does not contain a provision like that in section 213 (now sec. 5), imposing restrictions and requiring special findings in instances where the applicants are railroad subsidiaries. * * * nevertheless, the purpose of Congress' transportation policy, declared when enacting the Motor Carrier Act, refute any inference that Congress, while closing the door to railroad suppression of motor carrier competition by means of acquiring through a subsidiary existing motor carrier operations, at the same time left open the unfettered opportunity to do the same thing by means of obtaining through a subsidiary authority to institute new motor carrier operations. So far as opportunity for suppression of competition is concerned, there is little difference, particularly in the motor carrier field, between the opportunity afforded through the control by a railroad of an already existing motor carrier and that afforded by control of one newly created."

CONCLUSION.

For the foregoing reasons, the motions to affirm the judgment of the District Court should be denied.

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July 9, 1956

Certificate of Service

I hereby certify that I have today served the foregoing reply of the appellants in Case No. 973 upon each of the parties and upon the Solicitor General of the United States pursuant to the requirements of Rule 33, by depositing copies of the same in envelopes in a United States Post Office with first-class postage prepaid, (air mail postage for parties outside of the District of Columbia), addressed to the Solicitor General and to each of the counsel for such parties as follows:

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